

Washington, District of Columbia, or in the State or the district in which such Member or Resident Commissioner represents." 2 U.S.C. §92-1.

The Rules of the House of Representatives provides that a Member or officer of the House "shall retain no one under his payroll authority who does not perform official duties commensurate with the compensation received in the offices of the employing authority." Rule XLIII, clause 8 (1995). The Members' Congressional Handbook provides that "Members may not [emphasis in original] retain a Clerk Hire employee on their payroll who does not perform official duties commensurate with their compensation," and that "Clerk Hire employees must perform the duties for which they are compensated within the Washington, D.C., or district congressional office(s) of the Member." See section II.A, clauses 2, 3, at page 5. Moreover, Title 31 of the U.S. Code provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. §1301(a).

An employing office in the House of Representatives may adopt a time-off plan. It is advisable that the plan be in writing. The plan should note that its provisions revoke and supersede all prior customs, practices and usages concerning time and pay. The plan should stipulate that all covered employees, whether salaried or hourly, are employed for a fixed workweek, such as 40 hours per week. The plan should also require that all hours be strictly accounted for, either as hours worked or as hours charged to paid leave, such as annual, sick, personal, holiday, emergency, or administrative leave.

Mr. Speaker, I reserve the balance of my time.

Mr. FAZIO of California. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, my friend from California, Chairman THOMAS, has accurately described the purpose of the resolution. It simply approves the regulations issued by the Office of Compliance.

Reforming employment practices in the House took bi-partisan effort. Members from both sides of the aisle were steadfast in the reform efforts, and we were able to work through all the obstacles and pass the law.

I want to single out for praise the efforts to Chairman THOMAS, Representative SHAYS, Representative HOYER, and many other Members of this Congress, as well as Representative Swett in 103d Congress. They deserve recognition for their dedication to this reform.

House Members of both parties overwhelmingly supported this bill, and individual Members should take credit for their part in it. Remember, the underlying purpose of this law—imposing the same standards on the House as on the private sector—enjoyed the same strong bi-partisan support in this Congress that it enjoyed in the last Congress.

I think we can be proud, individually and as an institution, that we have arrived at this point. Furthermore, as I have surveyed my colleagues, I find them universally supportive of the new law, and the workplace fairness which it brings to the House. There is a genuine desire to comply with the law, and Members seem eager for information to help them comply.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. THOMAS. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from California [Mr. THOMAS] that the House suspend the rules and agree to the resolution, House Resolution 400.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the resolution was agreed to.

A motion to reconsider was laid on the table.

DIRECTING THE OFFICE OF COMPLIANCE TO PROVIDE EDUCATIONAL ASSISTANCE TO EMPLOYING OFFICES OF THE HOUSE IN SAME MANNER AS SUCH ASSISTANCE IS PROVIDED TO THE PRIVATE SECTOR THROUGH THE DEPARTMENT OF LABOR

Mr. THOMAS. Mr. Speaker, I move to suspend the rules and agree to the resolution (H. Res. 401) directing the Office of Compliance to provide educational assistance to employing offices of the House of Representatives regarding compliance with the Congressional Accountability Act of 1995 and requiring employing offices of the House of Representatives to obtain the prior approval of the chairman and the ranking minority party member of the Committee on House Oversight of the House of Representatives of the amount of any settlement payments made under such Act.

The Clerk read as follows:

H. RES. 401

Resolved,

SECTION 1. INTERPRETATION AND ADVICE BY OFFICE OF COMPLIANCE.

In carrying out its duties under section 301(h) of the Congressional Accountability Act of 1995, the Office of Compliance shall, through interpretive bulletins, advisory opinions, and other methods, provide educational assistance to employing offices of the House of Representatives in the same manner as, and to no lesser extent than, such assistance is provided to other employers through the Department of Labor with respect to laws made applicable to such offices under that Act, except that any employees of the Office of Compliance who provide such assistance may not participate in deciding complaints filed under section 405 of the Act or in deciding petitions for review filed under section 406 of the Act.

SEC. 2. APPROVAL OF AMOUNT OF SETTLEMENT PAYMENTS.

No employing office of the House of Representatives may enter into any settlement of a complaint under the Congressional Accountability Act of 1995 which includes the payment of funds unless the office has obtained the prior approval of the chairman and the ranking minority party member of the Committee on House Oversight of the House of Representatives, acting jointly, regarding the amount of funds to be paid.

The SPEAKER pro tempore. The gentleman from California [Mr. THOMAS]

and the gentleman from California [Mr. FAZIO] each will be recognized for 20 minutes.

The Chair recognizes the gentleman from California [Mr. THOMAS].

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Mr. THOMAS. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, Section 301(h) of the Congressional Accountability Act—Public Law 104-1—requires the Office of Compliance to carry out a program of education for employing authorities of the legislative branch with regard to the laws made applicable to Congress by the act. The purpose of this section was to ensure that employing offices have the information necessary to comply with the act.

On March 12, 1996, the Committee on House Oversight agreed to direct the Office of Compliance to provide educational assistance through interpretive bulletins, advisory opinions, and other methods with respect to the regulations adopted by the Office of Compliance. It is important to note that this assistance is currently provided to employers in the private sector by the Department of Labor.

The Office of Compliance has publicly claimed that they cannot issue advisory opinions. The authority to issue advisory opinions, in the committee's opinion, is a necessary function related to the authority to issue regulations. It seems a little disingenuous to adopt regulations. It seems a little disingenuous to adopt regulations and then claim an inability to explain or interpret those regulations. Therefore, H.R. 401 expresses the will of the House that the Office of Compliance provide educational assistance through various methods. Advisory opinions are only one of the many ways such assistance may be provided.

Mr. Speaker, I include for the RECORD a copy of an analysis on this issue from the American Law Division of the Congressional Research Service.

The document referred to is as follows:

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, April 15, 1996.

To: Committee on House Oversight; attention: Dan Crowley.

From: American Law Division.

Subject: Examination of Authority of Office of Compliance to Issue Advisory Opinions.

This memorandum is submitted in response to the committee's request, as discussed with Dan Crowley of the committee staff, concerning the subject noted above. Specifically, the committee has asked that we examine the position taken by the Office of Compliance that it cannot, consistent with the scheme of the Congressional Accountability Act of 1995¹ (CAA or the act), issue advisory opinions.

On March 12, 1996, the Committee on House Oversight (committee) considered, but did not report, two resolutions to approve regulations adopted by the Board of Directors (Board) of the Office of Compliance (Office) to implement the act.² The first section of

¹Footnotes at end.

each resolution states that specified regulations of the Board "are hereby approved. . . ." Section 2 of each resolution provides:

"In carrying out its duties under section 301(h) of the Congressional Accountability Act of 1995, the Office of Compliance shall, through interpretive bulletins, advisory opinions, and other methods, provide educational assistance to employing offices of the House of Representatives in the same manner as, and to no lesser extent than, such assistance is provided to other employers through the Department of Labor with respect to laws made applicable to the House of Representatives under that Act."

We have been advised by the committee staff that similar language may be included in a resolution to be considered by the House on April 15, 1996, to approve of the Board's regulations.³

The Board maintains that, given its functions and powers under the CAA, it cannot issue advisory opinions.⁴ Two premises provide the foundation for the Board's view. First, the Board argues that, as an administrative entity with adjudicatory functions under the CAA, it "may not issue binding legal interpretations concerning disputed matters in non-public proceedings and without the benefit of an adversary proceeding that is governed by rules of law and subject to judicial review. . . . [T]o issue such binding interpretations and advisory opinions . . . would . . . compromise the independence and impartiality of the Office. . . ." ⁵ And second, the Board considers the issuance of interpretations and advisory opinions to be incident to an agency's investigative and prosecutorial powers—a means by which an agency informs those subject to its jurisdiction of its prosecutorial policies and its stance with regard to conduct deemed to be violative of the pertinent laws and regulations. Since the Office does not generally exercise investigative and prosecutorial authority under the CAA, the Board believes that it would be inappropriate for it to issue advisory opinions.

From our review of the CAA, the committee's resolutions, the Board's argument, and sources on administrative law, it appears for several reasons that the Office need not be precluded from issuing advisory opinions of the type seemingly contemplated by the resolutions.

(2) The resolutions call for educational assistance. The resolutions call upon the Office, in fulfilling its duties under CAA, §301(h), to "provide educational assistance to employing offices of the House of Representatives" by means of "interpretive bulletins, advisory opinions, and other methods. . . ." ⁶ The resolutions are arguably intended to secure education for employers, and advisory opinions are only one of the means contemplated by which this education would be furnished. Although the Office deems it to be inappropriate to issue advisory opinions, it could fulfill the central purpose of this provision of the resolution by affording other types of educational assistance to employing offices. The Office acknowledges that it "has issued hundreds of pages of educational and informational materials, sponsored numerous educational programs, and established an information hot-line." ⁷ Additional assistance to employers of the type already provided by the Office, although perhaps more particularized, could satisfy the goal of the resolutions. Furthermore, it seems that the Office could issue advisory opinions, as contemplated by the resolutions, without raising the concerns advanced by the Office in regard to the impact on the "independence and impartiality of the office." ⁸ The Office is troubled by the prospect of issuing "bind-

ing legal interpretations . . . in non-public proceedings" on "individual fact-specific cases that may then later come before . . . [the Office] for adjudication." ⁹ However, it is arguable that an advisory opinion could be rendered by the Office, consistent with the purpose of the resolutions, without speaking to the facts of an individual case but addressing instead a fact pattern potentially of interest to a number of employing offices. Additionally, the educational assistance sought by the resolutions could be afforded without providing a binding legal interpretation, but merely further guidance along the lines already made available by the Office in other ways.¹⁰

(2) Advisory opinions may be issued pursuant to rulemaking power. Although our research has revealed a dearth of literature on the issuance of advisory opinions by administrative bodies, one study of advice giving by federal agencies observes that "the most striking characteristic of the advice-giving procedures of the agencies studied is that, except on the question of jurisdiction, agencies view advice-giving assistance to the public as part of their rulemaking, rather than their adjudicatory processes." ¹¹ From this statement, it seems that an agency with adjudicatory powers may provide advice¹² and it would further appear that such advice might encompass advisory opinions.¹³ Thus, it might be argued that the adjudicatory powers vested by the CAA in the Office of Compliance need not bar the Office from issuing advisory opinions. Furthermore, the advice giving function has been considered by at least some agencies to be a part of their rulemaking duties, and the Office does have rulemaking responsibilities under the act.¹⁴ Thus, the Office arguably could issue advisory opinions under its rulemaking powers, without regard to the fact that it lacks prosecutorial authority.

CONCLUSION

It would appear that the scheme of the CAA need not preclude the Office from issuing advisory opinions, as contemplated by the resolutions described above, pursuant to its education function or pursuant to its rulemaking power, notwithstanding the fact that it generally does not exercise investigative or prosecutorial powers. Furthermore, the Office's adjudicatory powers would not seem to bar it from issuing advisory opinions.

JAY R. SHAMPANSKY,
Legislative Attorney,
American law Division.

FOOTNOTES

¹ Pub. L. No. 104-1, 109 Stat. 3.

² Our analysis is based on discussion drafts of the resolutions, dated March 7, 1996, which were provided to us by the committee staff. One resolution is a simple House resolution which approves of regulations applicable to the House, and the other is a concurrent resolution which approves of regulations applicable to employees covered by the CAA who are not employees of either the House or the Senate.

³ Similar language appears in §1 of a revised discussion draft of the resolution provided to us by committee staff. However, the revised draft further specifies that "any employees of the Office of Compliance who provide such [educational] assistance may not participate in, deciding complaints filed under section 405 of the Act or in deciding petitions for review filed under section 405 of the Act. . . ."

⁴ Letter from Glen Nager, Chair of the Board, to the Honorable William M. Thomas, Chairman of the Committee on House Oversight (Mar. 15, 1996) (hereafter, "Board's letter"), at pp. 2-4 (A copy of the letter was provided to us by committee staff.) Similar views are set forth in a March 28, 1996, letter from Ricky Silberman, Executive Director, Office of Compliance, to the editor of Roll Call. Our analysis focuses on the reasoning set forth in the Board's letter with regard to the propriety of the issuance of advisory opinions by an administrative body in light of its adjudicatory, prosecutorial, and investigative powers. Our analysis is confined to the question of

the Board's authority to issue advisory opinions. We do not address any other issues that might be raised by the resolutions or by the Board's critique of the resolutions in its letter. The Board suggests, without explanation, that "the additional provisions of the resolution [including the provision concerning advisory opinions] are not legally binding. . . ." Board's letter, at p. 4. In the absence of elaboration by the Board, we do not explore here the issue of whether the additional provisions of the resolution would be binding. Our analysis is restricted to the question of whether the Board has authority under the CAA, as originally enacted, to issue advisory opinions.

⁵ Board's letter *supra* note 4, at p. 2.

⁶ Section 301(h) mandates that the Office "carry out a program of education for Members of Congress and other employing authorities . . . respecting the laws made applicable to them. . . ."

⁷ Board's letter, *supra* note 4, at p. 3.

⁸ *Id.*, at p. 2.

⁹ *Id.* (emphasis added).

¹⁰ The resolutions call upon the Office to provide educational assistance in the same manner as such assistance is provided to other employers through the Department of Labor. The Board contends that, lacking investigative and prosecutorial powers, it cannot meet this standard. Board letter, *supra* note 4, at pp. 2-3. But such investigative and prosecutorial powers may not be required to issue advisory opinions. See notes 11-14 and accompanying text, *infra*.

¹¹ Powell, "Sinners, Supplicants, and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act," 63 N.C.L. Rev. 339, 348-49 (1985). The article was based on a study of the following fourteen federal agencies: Consumer Product Safety Commission, Environmental Protection Agency, Federal Aviation Administration, Federal Communications Commission, Federal Election Commission, Federal Energy Regulatory Commission, Federal Maritime Commission, Federal Trade Commission, Food and Drug Administration Interstate Commerce Commission, National Labor Relations Board, Nuclear Regulatory Commission, Occupational Safety and Health Administration, and Securities and Exchange Commission. *Id.* at 348 n.36.

¹² See *id.* at 355 (adjudication occurs where advice giving by agency has already failed).

¹³ "Advice giving" is considered to be a type of rulemaking, and definitions of rulemaking generally do not attempt to distinguish among "interpretive rules and various kinds of announcements, interpretations, opinions, releases, rulings, practices, usages, and policies." *Id.* at 350 n.38, citing 1 K. Davis, *Administrative Law Treatise*, §5.01 at p. 289 (1958).

¹⁴ CAA §§303, 304.

Mr. Speaker, H.R. 401 also establishes the process by which a settlement may be entered into by any employing office of the House, as contemplated in Section 414 of the act. Specifically, this resolution safeguards taxpayer funds by requiring the prior approval of the chairman and the agreement of the ranking minority member of the Committee on House Oversight, acting jointly, regarding the amount of funds to be paid.

This procedure is similar to the current procedure for approval of settlement payments sanctioned by the Office of Fair Employment Practices under House rule 51. All cash settlements will be approved on a strictly bipartisan basis.

In practice, it will be incumbent upon the employing office or defense counsel to ensure that the chairman and ranking minority member approve the amount of funds to be paid prior to entering into any settlement involving a cash payment. It is important to note that this resolution does not affect the authority of the executive director of the Office of Compliance to approve settlement. Instead, it imposes a restriction on the ability of House employing offices to enter into settlement agreements involving cash payments.

Settlements involving only other forms of relief, including reinstatement, promotion, and prospective salary adjustments, are beyond the scope of this resolution.

Mr. Speaker, I reserve the balance of my time.

Mr. FAZIO of California. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, as with the earlier resolution, my friend, the gentleman from California, the chairman, has accurately described the purpose of this resolution. It simply expresses the House's desire to be treated the same as the private sector with respect to information available to Members to comply with the Act.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. THOMAS. Mr. Speaker, I have no further request for time, and I yield back the balance of my time.

The SPEAKER pro tempore (Mr. RIGGS). The question is on the motion offered by the gentleman from California [Mr. THOMAS] that the House suspend the rules and agree to the resolution, House Resolution 401.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the resolution was agreed to.

A motion to reconsider was laid on the table.

APPROVING FINAL REGULATIONS APPLICABLE TO JOINT ENTITIES OF THE HOUSE OF REPRESENTATIVES AND THE SENATE

Mr. THOMAS. Mr. Speaker, I move to suspend the rules and concur in the Senate concurrent resolution (S. Con. Res. 51) to provide for the approval of final regulations that are applicable to employing offices that are not employing offices of the House of Representatives or the Senate, and to covered employees who are not employees of the House of Representatives or the Senate, and that were issued by the Office of Compliance on January 22, 1996, and for other purposes.

The Clerk read as follows:

S. CON. RES. 51

Resolved by the Senate (the House of Representatives concurring). That the following regulations issued by the Office of Compliance on January 22, 1996, and applicable to employing offices that are not employing offices of the House of Representatives or the Senate, and to covered employees who are not employees of the House of Representatives or the Senate, are hereby approved as follows:

PART 825—FAMILY AND MEDICAL LEAVE

825.1 Purpose and scope

825.2 [Reserved]

Subpart A—What is the Family and Medical Leave Act, and to Whom Does it Apply under the Congressional Accountability Act?

825.100 What is the Family and Medical Leave Act?

825.101 What is the purpose of the FMLA?

825.102 When are the FMLA and the CAA effective for covered employees and employing offices?

825.103 How does the FMLA, as made applicable by the CAA, affect leave in progress on, or taken before, the effective date of the CAA?

825.104 What employing offices are covered by the FMLA, as made applicable by the CAA?

825.105 [Reserved]

825.106 How is "joint employment" treated under the FMLA as made applicable by the CAA?

825.107—825.109 [Reserved]

825.110 Which employees are "eligible" to take FMLA leave under these regulations?

825.111 [Reserved]

825.112 Under what kinds of circumstances are employing offices required to grant family or medical leave?

825.113 What do "spouse," "parent," and "son or daughter" mean for purposes of an employee qualifying to take FMLA leave?

825.114 What is a "serious health condition" entitling an employee to FMLA leave?

825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee"?

825.116 What does it mean that an employee is "needed to care for" a family member?

825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by "the medical necessity for" such leave?

825.118 What is a "health care provider"?

Subpart B—What Leave Is an Employee Entitled To Take Under The Family and Medical Leave Act, as Made Applicable by the Congressional Accountability Act?

825.200 How much leave may an employee take?

825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?

825.202 How much leave may a husband and wife take if they are employed by the same employing office?

825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

825.204 May an employing office transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced leave schedule?

825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

825.206 May an employing office deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, as made applicable by the CAA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?

825.207 Is FMLA leave paid or unpaid?

825.208 Under what circumstances may an employing office designate leave, paid or unpaid, as FMLA leave and, as a result, enable leave to be counted against the employee's total FMLA leave entitlement?

825.209 Is an employee entitled to benefits while using FMLA leave?

825.210 How may employees on FMLA leave pay their share of group health benefit premiums?

825.211 What special health benefits maintenance rules apply to multi-employer health plans?

825.212 What are the consequences of an employee's failure to make timely health plan premium payments?

825.213 May an employing office recover costs it incurred for maintaining "group health plan" or other non-health benefits coverage during FMLA leave?

825.214 What are an employee's rights on returning to work from FMLA leave?

825.215 What is an equivalent position?

825.216 Are there any limitations on an employing office's obligation to reinstate an employee?

825.217 What is a "key employee"?

825.218 What does "substantial and grievous economic injury" mean?

825.219 What are the rights of a key employee?

825.220 How are employees protected who request leave or otherwise assert FMLA rights?

Subpart C—How Do Employees Learn of Their Rights and Obligations under the FMLA, as Made Applicable by the CAA, and What Can an Employing Office Require of an Employee?

825.300 [Reserved]

825.301 What notices to employees are required of employing offices under the FMLA as made applicable by the CAA?

825.302 What notice does an employee have to give an employing office when the need for FMLA leave is foreseeable?

825.303 What are the requirements for an employee to furnish notice to an employing office where the need for FMLA leave is not foreseeable?

825.304 What recourse do employing offices have if employees fail to provide the required notice?

825.305 When must an employee provide medical certification to support FMLA leave?

825.306 How much information may be required in medical certifications of a serious health condition?

825.307 What may an employing office do if it questions the adequacy of a medical certification?

825.308 Under what circumstances may an employing office request subsequent recertifications of medical conditions?

825.309 What notice may an employing office require regarding an employee's intent to return to work?

825.310 Under what circumstances may an employing office require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a "fitness-for-duty" report)?

825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

825.312 Under what circumstances may an employing office refuse to provide FMLA leave or reinstatement to eligible employees?

Subpart D—What Enforcement Mechanisms Does the CAA Provide?

825.400 What can employees do who believe that their rights under the FMLA as made applicable by the CAA have been violated?

825.401—825.404 [Reserved]

Subpart E—[Reserved]

Subpart F—What Special Rules Apply to Employees of Schools?

825.600 To whom do the special rules apply?

825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?

825.602 What limitations apply to the taking of leave near the end of an academic term?

825.603 Is all leave taken during "periods of a particular duration" counted against the FMLA leave entitlement?